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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1477

CHICAGO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,
Petitioner,

vs.

CHICAGO TRIBUNE COMPANY, CHICAGO AMERICAN PUBLISHING COMPANY AND FIELD ENTERPRISES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 17, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 435 F. 2d 470 and is set out in the Appendix hereto at page 21A. The opinion of the United States District Court for the Northern District of Illinois is reported at 307 F. Supp. 422 and is set out in the Appendix hereto at page 6A. A certified copy of the record below will be filed upon request of this Court.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 17, 1970. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Whether the two corporate owners and publishers of the four Chicago newspapers of general circulation may, consistent with the First and Fourteenth Amendments to the United States Constitution, arbitrarily refuse to publish in their newspapers advertisements which express ideas, opinions or facts on political or social issues—and defend their refusal in court on constitutional grounds—where:

(1) the newspapers enjoy effective or monopoly control over the most important forum for the exercise of First Amendment rights, and

(2) the newspapers are incorporated under State law and the State has involved itself in the operation of the newspapers by, *inter alia,* (a) granting newspapers special tax exemptions and privileges not enjoyed by other citizens or other business enterprises, (b) guaranteeing income to and making the legal system dependent upon newspapers by requiring publication of legal notices in newspapers, and (c) aiding *these particular newspapers* by permitting their sale from newsstands located on public streets while denying such sales by competitors.

Whether the First Amendment to the United States Constitution requires that a different "state action" standard be applied to newspapers than to other persons or entities in determining whether their conduct falls within the protective ambit of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES.

First Amendment to the United States Constitution:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right . . . to petition the Government for a redress of grievances."

Fourteenth Amendment to the United States Constitution, Section 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 United States Code, Sec. 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Ill. Rev. Stat. ch. 5, § 87a-5; ch. 7½, § 2; ch. 19, § 202; ch. 24, § 1-2-4; ch. 78, § 4; ch. 81, § 1007-1; ch. 105, § 2-12; ch. 110, § 14; ch. 120, §§ 439.2, 439.32 and 440, all of which pertain to newspapers and are set out in the Appendix hereto at page 2A.

Municipal Code of Chicago, § 34-12:

> ". . . Nothing shall be exhibited, offered or sold from newspaper stands [on the public streets] except daily newspapers printed and published in the City."

STATEMENT OF THE CASE.

This case involves respondents' refusal to print petitioner's editorial advertisement in their newspapers. A copy of the advertisement is set out in the Appendix hereto at page 1A.

The respondents Field Enterprises, Inc. and Chicago Tribune Company, the owners of four daily Chicago newspapers, control and monopolize the general circulation newspaper industry in the City of Chicago.[1] For the expression of ideas or opinions there is no satisfactory substitute for space in defendants' newspapers. (Complaint, pp. 2-4.)

Petitioner, a union, tendered its advertisement to the respondents for publication in their four newspapers after becoming involved in a dispute with Chicago retailers regarding their sale of imported men's and boys' clothing and after it had commenced picketing the largest of these retailers. The advertisement explains why petitioner was picketing and its position that retailers should not sell and members of the public should not purchase imported clothing until the exporting countries agree to voluntary quotas. (Complaint, pp. 5-7.)

Respondents refused to publish petitioner's proposed advertisement. The Chicago Tribune Company's employee who rejected the advertisement on behalf of the Chicago *Tribune* and Chicago *Today* newspapers allegedly did so because of his personal belief that "the unfavorable treatment of a single retailer was unfair and would be mis-

1. When this lawsuit was filed the respondent American Publishing Company, a wholly owned subsidiary of the Chicago Tribune Company, published Chicago *Today*. Apparently the Chicago Tribune Company now is the publisher of *Today*.

leading to readers . . .'' (James B. Jordan Affidavit, p. 2.) Field Enterprises, Inc.'s employee who rejected the advertisement on behalf of the Chicago *Sun-Times* and Chicago *Daily News* newspapers stated that the advertisement was rejected by the ''Advertising Acceptance Committee'' because it ''violated our policy against printing advertisements which name others unless they consent to being named.'' (Howell I. Jones Dep., Produced Document No. 12; Jones Affidavit, p. 2.) In fact, the *Sun-Times* and *Daily News* do print advertisements, including advertisements for their own newspapers, which name others without seeking the consent of the party named and, furthermore, there is no Advertising Acceptance Committee. (Jones Dep. Tr. pp. 22, 38, 42-44; Exhs. 1, 2, 5-8.)

After respondents refused to publish its proposed advertisement, petitioner brought suit in the Federal District Court to require publication. Jurisdiction was invoked under 28 U. S. C. §§ 1331 and 1343(3) on the ground that the action arises under the First and Fourteenth Amendments to the United States Constitution and 42 U. S. C. § 1983 and the matter in controversy exceeds the sum or value of $10,000. The District Court granted respondents' motions for summary judgment, both with respect to the original complaint and to the complaint as amended. The Court of Appeals affirmed. Both courts held that respondents' conduct did not involve ''state action'' and therefore they could arbitrarily reject petitioner's proposed advertisement. It was not suggested by either court or by the respondents that the rejection of petitioner's advertisement satisfied First or Fourteenth Amendment standards. Rather, the District Court ruled, and the Court of Appeals affirmed, that these constitutional standards were inapplicable.

It is undisputed that the State involves itself in the operation of defendants' newspapers in various ways, all of

which are highly beneficial to the defendants. For example, newspapers in the State of Illinois enjoy special tax exemptions which are not enjoyed by other citizens, even those citizens whose businesses involve the exercise of First Amendment rights. Newspapers are specifically exempted from the State use tax, service use tax and retailers occupation tax.[2] Illinois law exempts newspaper employees from jury service[3] and requires public officials and private citizens who seek legal relief to publish and pay for notices in newspapers.[4]

Furthermore, defendants' newspapers enjoy protection under the law against competition. Newspaper stands on the public streets of the City of Chicago are prohibited from selling anything except "daily newspapers printed and published in the City." Municipal Code of Chicago, § 34-12. Thus, while they may sell respondents' newspapers, they may not lawfully sell the New York *Times*, *Newsweek*, or other major, competing newspapers or magazines.

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2. Ill. Rev. Stat. ch. 120, §§ 439.2, 439.32 and 440.

3. Ill. Rev. Stat. ch. 78, § 4.

4. See, e.g., Ill. Rev. Stat. ch. 5, § 87a-5; ch. 7½, § 2; ch. 19, § 202; ch. 24, § 1-2-4; ch. 81, § 1007-1; ch. 105, § 2-12 and ch. 110. § 14.

REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court of Appeals Is Based on an Erroneous Rule of Law Which Creates a Presumption, Effectively Irrebuttable, That Newspapers Are Not Engaged in "State Action" and Therefore Are Not Subject to the Mandates of the Constitution.

This Erroneous Rule of Law Is in Conflict with Applicable Decisions of This Court, Has Effectively Deprived Petitioner of Its First Amendment Rights and Has Already Served as Precedent to Deprive First Amendment Rights to Others.

The decisions of the District Court and Court of Appeals in this case resolve an important question of free speech in favor of censorship. They are in conflict with both the letter and spirit of this Court's decisions on the First Amendment and misapply this Court's "state action" precedents defining the scope of the Fourteenth Amendment.

At issue is the right of the public to have access to newspapers for the purpose of exercising First Amendment rights. The importance of this issue is evidenced by the fact that the American Civil Liberties Union, the Businessmen for a Public Interest and the Chicago Federation of Labor and Industrial Union Council all acted as amici curiae in support of petitioner's right to express its opinions by means of an editorial advertisement. The importance of the issue was also recognized by the District Court below:

> "One of the tragedies of our age is that the failure to communicate effectively through conventional means has led some to attempt to persuade unconventionally and often violently. To the extent that the market

> mechanism is impaired, to the extent that discussion is not effectively full as well as legally free, we think that the public is done a disservice." 307 F. Supp. at 429, Appendix, p. 17A.

The District Court, however, opted to protect censorship, not full and free discussion. And the Court of Appeals affirmed.

The importance of the lower courts' ruling is made all the greater by the fact that it has already been followed by another Federal District Court: in ***Resident Participation of Denver Incorporated, etc., et al.*** v. ***Love, etc., et al.,*** ..... F. Supp. ....., D. Colo., Civil Action C-2548 (Feb. 8, 1971), involving an editorial advertisement soliciting letters of complaint to state and city officials regarding a proposed rendering plant in a residential neighborhood. The District Court followed the rule authorizing censorship with understandable reluctance.

> "We are aware that lack of access to those media which reach large audiences has, some believe, given birth to a frustration which compels otherwise peaceful citizens to engage in violence to get their views to the nation," *Resident Participation,* ..... F. Supp. at ..... (Slip Sheet, p. 11).

The ruling that respondents could constitutionally refuse to print petitioner's advertisement was, the District Court and Court of Appeals held, dictated by the fact that respondents' refusal did not involve "state action." This conclusion was, however, inconsistent with the established "state action" precedents of this Court. It was reached only because the courts below, instead of following established precedents, introduced a new rule of law which *presumes* that conduct of newspapers does not involve "state action."

Both the District Court and the Court of Appeals improperly held that there was no "state action" by applying

this presumptive rule. The Court of Appeals made reference to the "traditional concept of the role of the press in our society" and then quoted with approval from the District Court's opinion that,

> "In sum, the function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government's control and supervision." 435 F. 2d at 474, Appendix, p. 26A.

Only after starting with this presumption and keeping the "private enterprise" nature of newspapers "in mind" (435 F. 2d at 474, Appendix, p. 26A), did the Court of Appeals review the leading "state action" cases and conclude that respondents' rejection of petitioner's advertisement failed to involve "state action." Without this rule of presumption it would have been *impossible* for the courts below to have so ruled. For the record in this case contains *nothing* on the question of "state action" other than petitioner's complaint and the various laws of the State of Illinois and the City of Chicago.

It appears from their opinions that the courts below followed this rule of presumption because of an erroneous belief that under the circumstances of this case a finding of "state action"—along with the ruling which would necessarily follow, that under the First and Fourteenth Amendments petitioner could not arbitrarily be denied the right to publish its editorial advertisement—would impinge upon the First Amendment rights of the respondents. In fact, however, recognition of petitioner's constitutional right to express opinion by means of an editorial advertisement would in no way impinge upon First Amendment rights of the respondents. Only respondents' power to censor, not their right of free speech, would be affected—and the First Amendment does not protect the power of censorship.

Since there is no conflict between petitioner's and respondents' First Amendment rights, there is no reason to apply a rule of presumption that conduct of newspapers fails to involve "state action." This rule of presumption, followed for the first time in this case, bars effective exercise of First Amendment rights and should be repudiated by this Court.

2. The First Amendment Does Not Protect Respondents' Power of Censorship, There Is No Conflict Between the First Amendment Rights of Petitioner and Respondents, and There Is No Reason to Introduce a New "State Action" Rule for Newspapers Which Effectively Deprives All Others of Their First Amendment Rights.

The reason for the lower courts' employment of a new, restrictive "state action" rule of presumption for newspapers was, clearly, a baseless fear that a finding of "state action" would result in an unconstitutional regulation of respondents' freedom of the press. As the District Court stated:

> ". . . any attempted regulation of the press' freedom stands in a different Constitutional light and must be viewed differently than regulations of other forms of private commerce and association." 307 F. Supp. at 426, Appendix p. 12A.

The courts' fear is unfounded. Respondents' freedom of the press does not include the freedom to deprive others of their freedom of speech. A finding of "state action" and a ruling that respondents had to obey the mandates of the Constitution would in no way involve "regulation" of respondents' exercise of their freedom of the press.

The Constitution requires only that the defendants refrain from discrimination in their selling of space for editorial advertisements. Under no circumstances would

defendants' editorial or news content be censored or regulated. All editorial advertisements (just as both editorial and commercial advertisements now) could be clearly labeled as such and the newspapers would no more vouch for the positions stated therein than they vouch for products promoted in their commercial advertisements. Indeed, the newspapers could editorialize freely against (or for) positions taken in the editorial advertisements they print.

The First Amendment is not a two-edged sword. *In no way does the power to prohibit censorship imply the right to impose censorship.* Consistent with the First Amendment respondents should be required to print plaintiff's advertisement which argues that the American public should refrain from purchasing men's and boys' imported clothing. Also consistent with the First Amendment, defendants may publish a full page editorial opposite plaintiff's advertisement which argues that foreign policy considerations make it imperative that all American citizens purchase imported clothing.

Nor, as suggested by the District Court (307 F. Supp. at 429, Appendix p. 17A), will either the newspapers or the courts face substantial difficulties in following the constitutional mandate, for the constitutional rule is both clear and simple:

> "constitutional standards are satisfied if all those who wish to exercise their right to state beliefs and opinions protected by the First Amendment are permitted to do so on an equal basis." *Wirta* v. *Alameda-Contra Costa Transit District,* 68 Cal. 2d 51, 62, 434 P. 2d 982, 990 (Sup. Ct. Calif., 1967).

This rule *does not involve any value judgment regarding the views expressed in the advertisement.* It is already being followed in cases involving advertising media owned or controlled by public authorities. See, *e.g. Zucker* v.

Panitz, 299 F. Supp. 102 (S. D. N. Y., 1969), and *Lee* v. *Board of Regents of State Colleges,* 306 F. Supp. 1097 (W. D. Wisc., 1969) for cases involving school newspapers, and *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P. 2d 350 (Sup. Ct. Wash., 1969), *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (S. D. N. Y., 1967), and *Wirta* v. *Alameda-Contra Costa Transit District, supra,* for cases involving advertising facilities on public transportation.

The lower courts believed that the First Amendment required a rule of law which immunized respondents' censorship from judicial review. Although paradoxical, this is not the first time that such a contention has been made. The Supreme Court rejected this reverse-English use of the First Amendment in *Associated Press* v. *United States,* 326 U. S. 1 (1945), in which it was unsuccessfully argued that the First Amendment exempted newspapers from the antitrust laws.

> "*It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.* The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. *That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.* Surely a command that the government itself shall not impede the free flow of ideas does not afford non-government combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. *Free-*

> *dom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.* The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity." [Italics added.] 326 U. S. at 20.

Just as the government can, consistent with and in furtherance of the commands of the First Amendment, enjoin newspapers from combining to impose restraints on the First Amendment rights of others, so can the courts, without "regulating" the press, require newspapers who have met the usual standards for "state action" to obey the dictates of the First and Fourteenth Amendments.

> "Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing." *State* v. *Buchanan,* 250 Ore. 244, 249, 436 P. 2d 729, 731 (1968).

> "Freedom of the press was never intended to be a special privilege extended to its publishers. On the contrary, it was conceived by the writers of the Constitution and of the Bill of Rights to be a right of the people in a democracy to unrestricted information and presentation of views on government for which the press was a tailor-made medium of dissemination. Freedom of the press, therefore, is a people's personal right rather than a property right." *Firstamerica Dev. Corp.* v. *Daytona Beach N. J. Corp.,* 196 So. 2d 97, 99 (Fla. Sup. Ct. 1966).

By immunizing from judicial review censorship by newspapers and by denying access to newspapers by the public, the ruling of the lower courts in this case effectively converts freedom of the press into a private preserve for newspaper owners. By simply applying the same "state action" standard to the conduct of newspaper owners as is applied to the conduct of others, this Court can assure that freedom of the press remains a right which belongs to and is enjoyed by the public.

3. Respondents' Conduct in Refusing to Publish Petitioner's Editorial Advertisement Satisfies the Tests for "State Action" Under the Applicable Decisions of This Court.

Two general tests for determining "state action" have been followed by this Court. First, conduct of private entities are subject to the Fourteenth Amendment when the entities exercise effective or monopoly control in an area of vital public concern. Second, conduct of otherwise private entities are subject to the Fourteenth Amendment where there is State involvement in their conduct or the entities enjoy a special relationship with the State. Both tests are satisfied in this case.

The leading cases in which private conduct was held to involve "state action" and therefore was subject to constitutional restrictions because of the private entity's monopoly control in an area of public concern are *Marsh* v. *Alabama,* 326 U. S. 501 (1946); *Terry* v. *Adams,* 345 U. S. 461 (1953); and *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968). In *Terry* v. *Adams* a private political association, with no actual ties to the State, effectively controlled the outcome of elections and, therefore, the constitutional right to cast a meaningful vote. In *Marsh* v. *Alabama* and *Food Employees* v. *Logan Valley Plaza* the owners of a company town and a shopping center, respectively, effectively controlled the First Amendment right of free speech. In the present case the respondents effectively control the exercise of First Amendment rights in the most important media available for that exercise.

The Court of Appeals, its rule of presumption aside, wholly failed to distinguish these leading cases, and in fact they cannot be distinguished. There is just as much "nonaction by public officials" (435 F. 2d at 475, Appendix p. 29A) with respect to respondents' control over the right

of free expression as there was in *Terry* v. *Adams* with respect to the control exercised over the right to cast a meaningful note. And there can hardly be a meaningful constitutional difference between access by sufferance of the owner to the premises of a company town or shopping center and access by "contract" with the owner to the pages of a newspaper (435 F. 2d at 475, Appendix p. 27A).

The important fact in *Terry* v. *Adams*, *Marsh* v. *Alabama*, *Food Employees* v. *Logan Valley Plaza* and the present case is that "private" parties had control over the exercise of important constitutional rights, they used that control to deny constitutional rights to others, and the State acquiesced in that denial. The shopping center in *Food Employees* was entirely private, but for the limited purpose of protecting First Amendment rights this Court found the requisite "state action." Newspapers, today as well as historically, have been the most important vehicle for the exercise of free speech and the person who is denied access to the newspapers is far more effectively barred from exercising his freedom of speech than is the person who is denied access to a shopping center. As this Court stated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 266 (1964), editorial advertisements in newspapers are

> ". . . an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press."

When that "exercise [of] their freedom of speech" is denied by a party or parties with the power to do so, "state action" is involved.[5]

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5. The Court of Appeals pointed to circulation figures to demonstrate that the two respondents are in competition and that, therefore, neither enjoy "monopoly power." 435 F. 2d at 477, Appendix p. 32A. Respondents' four newspapers, however, are the only Chicago area papers of general circulation and together they

This Court has recognized that there is no simple test to determine when, because of State involvement in the conduct of a private party or because of a special relationship between the private party and the State, the State involvement is sufficient to call into play the safeguards of the Constitution. As this Court (quoting from *Cooper* v. *Aaron*, 358 U. S. 1, 4 (1958)) stated in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), a finding of "state action" can result from any form of "state participation."

> "It was language in the opinion in the Civil Rights Cases, *supra*, that phrased the broad test of state responsibility under the Fourteenth Amendment, predicating its consequence upon 'State action of every kind * * * which denies * * * the equal protection of the laws.' At p. 11 of 109 U. S., at page 21 of 3 S. Ct. And only two Terms ago, some 75 years later, *the same concept of state responsibility was interpreted as necessarily following upon 'state participation through any arrangement, management, funds or property.'*" [Italics added.] 365 U. S. at 721-22.

Indeed, the "imprecision" of this "state action" test is necessary in order to include all types of state involvement and to assure the greatest breadth of constitutional protections.

> "Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendement was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility

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monopolize newspaper coverage in the City. This is not an antitrust case and the magnitude of each respondent is so great that its conduct clearly involves "state action." The right of free speech can hardly be left to a market place controlled by two corporate giants.

> under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' *Kotch* v. *Board of River Port Pilot Com'rs.*, 330 U. S. 552, 556, 67 S. Ct. 910, 912, 91 L. Ed. 1093. *Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.*" [Italics added.] 365 U. S. at 722.

The State involvement in respondents' conduct is far reaching and multi-faceted. The very creation and existence of the corporate respondents is the result of State law.[6] The freedom of the press which they enjoy is safeguarded by the Constitution and the courts. The State-granted right of incorporation and the unique position they enjoy under the Constitution are integral factors in the power which respondents enjoy, and exercised against petitioner, to deny First Amendment rights to others.

The involvement of the State in respondents' refusal to print petitioner's editorial advertisement included the refusal of the District Court to exercise its equitable power to protect the very exercise of First Amendment rights which this Court recognized and protected in *New York Times Co.* v. *Sullivan, supra.* Involvement of the courts is, of course, involvement of the State. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). See also *New York Times Co. v. Sullivan*, 376 U. S. at 265: "The test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised"; and *Edwards* v. *Habib*, 397 F. 2d 687 (D. C. Cir. 1968).

A mutually important relationship exists between the State and respondents. The defendants are conferring a benefit on the State which, by its very nature, could

6. See Berle, *Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933, 942-43 (1952).

be conferred only on the State, and the State is conferring benefits on the defendants which only the State could confer. Laws are passed, official duties are performed and legal wrongs are redressed with the aid of newspapers. In return for performing this public function, the defendants are the recipients of revenue derived from publishing legally required notices, are the beneficiaries of special tax exemptions, and are protected against the competition of magazines and non-daily or out-of-town newspapers which, by law, are denied access to the newsstands located on the public sidewalks.

There can be no question but that, applying the usual standards, respondents' conduct in refusing to print petitioner's editorial advertisement involved "state action" and is subject to the mandates and guaranties of the Constitution.

CONCLUSION.

For the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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Appendix

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APPENDIX.



You bet we're picketing Marshall Field & Co

In this age of demonstrations, many of them for the wrong reasons, we thought twice about placing a picket line in front of one of Chicago's great retail establishments. But that was only momentary. There is no alternative when the flood of imported men's and boys' clothing and apparel from the sweat shops of foreign nations begin to threaten the jobs and lives of 10,000 Chicagoans . . . many of them your friends and neighbors.

Marshall Field & Company and other retailers insist on carrying, in ever-increasing amounts, foreign made clothing, produced overseas (in some cases by 14 and 15 year old girls) and produced by those being paid as little as 8 cents an hour in Hong Kong to as low as 50 cents an hour in Europe. Our people have fought for decent wages and a decent standard of living.

We've been called the largest employer of minority groups in the nation. If it were not for the hundreds of thousands of jobs in the apparel field, where would our people go for jobs? Would they be added to the already inflated welfare rolls? Would you be ready to pay higher taxes to cover the cost of increased public assistance? Many of them would surely wind up on the welfare rolls. While American government is designing programs on the one hand to encourage industry to help the disadvantaged cities, this flow of imports is making economic conditions worse for many hundreds of thousands of people in low income groups and threatens companies which are bulwark of the economic life of their communities. The apparel industry is vital to the nation and the nation's prosperity. It is a source of job opportunities that can't be replaced and therefore shouldn't be allowed to shrink.

What do we want? We want quotas, not an absolute cessation. The Nixon administration has indicated its support of effective voluntary agreements with other nations to limit the textile apparel imports. And why not? The other nations have quotas restricting us. Still, while this is "in process", we must do something at the local level where only you, the consumer, can help.

You don't benefit from these imports. The cost of labor in a garment is about 33 percent of the wholesale price. The mark up is much higher than that in the U.S. You might think that since the cost of labor is so much lower, you would stand to gain from lower prices. Not so. The foreign-made garment receives a "snob appeal" emphasis and the price for the most part is rarely reduced. Thus, you pay the same and sometimes more . . . and the quality does NOT measure up to American know-how.

Imports increased up to 60 percent in 1968. How high must they go before something is done? Must we see the elimination of jobs and the uncaring disintegration of a great industry?"

Marshall Field & Company believes and they have so stated that they are giving the customer what he wants. We don't think so. We think that the customer, in full possession of the facts, might not agree with Marshall Field & Company's position. We think Chicagoans, *given a choice*, might choose to buy American made clothes. Might even resent the retailers who buy foreign made clothing and pocket the higher mark-ups without passing along the savings.

CHICAGO JOINT BOARD
Amalgamated
Clothing Workers
of America AFL-CIO



Ill. Rev. Stat. ch. 5 § 87a.5:

A copy of the order [by the Director of the Department of Agriculture restricting the use of certain pesticides] shall be posted in at least five of the most public places within the affected area and may be published in a newspaper of general circulation within the affected area, at least five days before the effective date of the order.

Ill. Rev. Stat. ch. 7½ § 2:

. . . At least 3 months before the next election of members of the General Assembly, following the passage of the proposed amendment, the Secretary of State shall publish the amendment, in full in 8 point type, or the equivalent thereto, in at least one secular newspaper of general circulation in every county in this State in which a newspaper is published. In counties in which 2 or more newspapers are published, the Secretary of State shall cause such amendment to be published in 2 newspapers. In counties having a population of 500,000 or more, such amendment shall be published in not less than 6 newspapers of general circulation. After the first publication, the publication of such amendment shall be repeated once each week for 2 consecutive weeks. In selecting newspapers in which to publish such amendment the Secretary of State shall have regard solely to the circulation of such newspapers, selecting secular newspapers in every case having the largest circulation. . . .

Ill. Rev. Stat. ch. 19 § 202:

The Board [Waukegan Port District Board] has power to pass all ordinances and make all rules and regulations

proper or necessary, and to carry into effect the powers granted to the District, with such fines or penalties as may be deemed proper. All fines and penalties shall be imposed by ordinances, which shall be published in a newspaper of general circulation published in the area embraced by the District. No such ordinance shall take effect until 10 days after its publication.

Ill. Rev. Stat. ch. 24 § 1-2-4:

All ordinances of cities, villages and incorporated towns imposing any fine, penalty, imprisonment, or forfeiture, or making any appropriation, shall (1) be printed in book or pamphlet form, published by authority of the corporate authorities, or (2) be published at least once, within 10 days after passage, in one or more newspapers published in the municipality, or if no newspaper is published therein, then in one or more newspapers with a general circulation within the municipality. . . .

Ill. Rev. Stat. ch. 78 § 4:

The following persons shall be exempt from serving as jurors, to-wit: . . . all persons actively employed upon the editorial or mehanical staffs and departments of any newspaper of general circulation printed and published in this state.

Ill. Rev. Stat. ch. 81 § 1007-1:

Whenever notice must be given by any provision in this Act [The Illinois Public Library District Act], such shall be given as follows:

(a) By publication: one notice published in one or more daily or weekly newspapers published or circulated in the district, or. . . .

Ill. Rev. Stat. ch. 105 § 2-12:

Notice of the time and place or places of holding such elections [elections of commissioners in General Districts] shall be given by the commissioners of such park district by publishing the same once in one or more newspapers, if there be any published in the district, at least ten days prior to the election; if none be published in said district, then in one or more newspapers of general circulation in the district; if there be no newspaper of general circulation in the district, then by causing said notice to be posted in five (5) public places within the district.

Ill. Rev. Stat. ch. 110 § 14:

Whenever, in any action affecting property or status within the jurisdiction of the court, including an action to obtain the specific performance, reformation, or rescission of a contract for the conveyance of land, or in any action to revive a judgment or decree, plaintiff or his attorney shall file, at the office of the clerk of the court in which his action is pending, an affidavit showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and stating the place of residence of the defendant, if known, or that upon diligent inquiry his place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper published in the county in which the action is pending. If there is no newspaper published in that county, then the publication shall be in a newspaper published in an adjoining county in this State, having a circulation in the county in which action is pending.

Ill. Rev. Stat. ch. 120 § 439.2:

The purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) is not a purchase, use or sale of tangible personal property [for purposes of the Tax Act].

Ill. Rev. Stat. ch. 120 § 439.32:

The purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) is not a purchase, use or sale of service or of tangible personal property within the meaning of this Act [for purposes of the Service Use Tax Act].

Ill. Rev. Stat. ch. 120 § 440:

The purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) is not a purchase, use or sale of tangible personal property [for purposes of the Retailers' Occupation Tax Act]. . . .

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

CHICAGO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,
Plaintiff.

vs.

CHICAGO TRIBUNE COMPANY, CHICAGO AMERICAN PUBLISHING COMPANY AND FIELD ENTERPRISES, INC.,
Defendants.

No. 69 C 1898

MEMORANDUM OPINION

Defendants' Motions for Summary Judgment
Plaintiff's Motion for Preliminary Injunction

This action arises from the refusal of the defendants, the Chicago Tribune Co. (Tribune), the Chicago American Publishing Co. (American), and Field Enterprises, Inc. (Field), to publish in their respective newspapers an advertisement submitted by the plaintiff, Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO (Union). The plaintiff is seeking both injunctive relief and compensatory and exemplary damages.

Plaintiff is a national labor union with numerous local unions in the Chicagoland area. Defendant Tribune is the owner and publisher of a major Chicago newspaper, the Chicago Tribune. Defendant American, which owns and publishes another major Chicago newspaper, Chicago Today, is a wholly owned subsidiary of defendant Tribune. Field is the owner and publisher of the Chicago Sun-Times

and the Chicago Daily News, two other major metropolitan dailies.

Union is currently involved in a dispute with Marshall Field & Co., the owner and operator of Chicago's largest retail department store, regarding the sale of imported men's and boys' clothing. Marshall Field & Co. is a leading Chicagoland outlet for imported clothing. It is Union's position that the unrestricted sale of imported men's and boys' clothing will eliminate jobs for American workers manufacturing such clothing, that such a result would impose a hardship on those workers specifically and the American public generally, and that, consequently, retail outlets of foreign made clothing should refrain from the purchase and resale of such goods and the public should not buy them until such time as the exporting nations voluntarily agree to quotas on the amount of clothing to be sent into the United States.

During the course of this dispute, which continues at this time, Union prepared and submitted to defendants an advertisement for publication in their respective newspapers. The ad explained why plaintiff was picketing Marshall Field & Co. and set forth Union's position on the sale of imported men's and boys' clothing. All four major metropolitan newspapers refused to publish the ad.

In Count I of its complaint, Union contends that defendants are quasi-public entities whose refusal to publish is a violation of plaintiff's constitutional rights to free speech and equal protection. Count II alleges that defendants' refusal to publish Union's ad constitutes a breach of contract, which contract arises from plaintiff's acceptance of an alleged standing offer by the defendants to print any lawful advertisement. Count III alleges that plaintiff justifiably relied to their detriment on representations by the defendants to the effect that they would publish any

lawful advertisement. In its prayer for relief, Union asks that the defendants be permanently enjoined from refusing to publish the submitted ad, that during the pendancy of this action similar equitable relief be afforded, or that defendants be enjoined from publishing any advertisement of Marshall Field & Co. for or including imported men's or boys' clothing. Union also seeks $1,000 in compensatory damages and $5,000 in exemplary damages.

Presently before the court are plaintiff's motion for a preliminary injunction and defendants' motions for summary judgment. The motion for preliminary injunction seeks the equitable relief found in the prayer of plaintiff's complaint. Field's motion for summary judgment contends that the complaint fails to state a claim upon which relief may be granted. In addition to this contention, the other defendants, in their motion for summary judgment, contend that this court lacks federal jurisdiction and that the granting of requested relief would violate defendants' rights to freedom of the press and free speech under the federal and state constitutions.

Initially, we note that summary judgment is appropriate where, as here, there are no material factual issues in dispute and only legal issues need be resolved. *Silverstein* v. *United States*, 293 F. Supp. 1106, 1110 (N. D. Ill. 1968).

Counts II and III, which are based on contractual or quasi-contractual theories, have not been supported by any discussion in plaintiff's brief and may be dismissed easily. Under general contract theory, the presumption is that general advertising aimed at the public is not an offer to enter a contract.

> "Neither the advertiser nor the reader of his notice understands that the latter is empowered to close the deal without further expression by the former. Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can

> reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear." 1 Corbin, *Contracts* § 25, at 75 (1693).

Cf. Wall v. *World Publishing Co.*, 263 P. 2d 1010, 1012 (Okla. 1953) (absent express promise, invitation by newspaper to readers to write letters on matters of public interest is not offer to publish all letters received in response).

None of the defendants has explicitly extended an offer to the general public to publish any lawful advertisement which is submitted for publication by a party who is willing and able to pay the standard advertising rate, nor has any defendant so represented that such a policy exists. In plain and clear words, each has reserved the right to reject any advertisement. See The Chicago Tribune Advertising Acceptability Guide, p. 3, submitted as Exhibit B to Complaint; "General Advertising Rates: Chicago Tribune, Chicago Today," (p. 12) submitted as Exhibit A to Affidavit, ¶ 3, of Mr. Charles B. Jordan; Affidavit of Mr. Howell Jones, p. 2. Parenthetically, the Tribune guidelines discuss the newspaper's concern with honesty, taste and effectiveness, and indicate that the newspaper will exclude material which, for instance, it feels is misleading, unfair, indecent or illegal. At this time, we need make no evaluation as to the reasonableness of this policy. It is sufficient for the purposes of ruling on the motion for summary judgment to find that the policy of reserving the right to reject advertisement exists and is apparent from a review of the newspapers various pamphlets concerning advertising.

Defendants' motions for summary judgment are granted as to Counts II and III.

We turn now to a consideration of the issues presented in the first count of the Complaint. As summarized previously, it is plaintiff's thesis that the defendants are quasi-public entities whose refusal to publish an advertisement

setting forth plaintiff's position on a public issue is a violation of the plaintiff's constitutional rights to free speech and equal protection. Defendants' position is that their acts are private in nature and not subject to the asserted constitutional restrictions.

The first Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." While by its language, this amendment is binding only on the national government, it has been extended through the due process clause of the Fourteenth Amendment to prohibit the impairment of fundamental rights by the various states. *Fiske* v. *Kansas*, 274 U. S. 380, 387 (1927); *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925). Yet, while the Fourteenth Amendment affords protection from state action as well as that from the national government, it does not protect against wrongs done by private persons. *United States* v. *Guest*, 383 U. S. 745, 755 (1966); *Motley* v. *Virginia Hardware and Manufacturing Co.*, 287 F. Supp. 790, 793 (W. D. Va. 1968). As the "distinction between purely private discrimination and discrimination pursuant to 'state action'" persists, *Huey* v. *Barloga*, 277 F. Supp. 864, 869 (N. D. Ill. 1967), "(i)t is elementary that in order to establish a violation of the Fourteenth Amendment, there must be 'state action' which results in deprivation of a right, privilege or immunity protected by that Amendment." *Rogers* v. *Provident Hospital*, 241 F. Supp. 633, 636-37 (N. D. Ill. 1965).

The state action requirement has, of course, been applied to numerous situations besides those involving official governmental entities. In each case, the private or nongovernmental conduct has related to an area of vital public concern. One group of such cases involves private ownership and control of the physical premises on which people live or work. Thus, in *Marsh* v. *Alabama*, 326 U. S. 501 (1946) the Supreme Court held that a company town's

refusal to permit the use of its streets for the distribution of religious literature violated the Fourteenth Amendment. The Court reasoned:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . .
>
> "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id.* at 506-07.

The *Marsh* rationale was recently adopted in *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968), where the Court held that pickets' constitutional rights were violated when a shopping center and supermarket refused to permit picketing on their premises.

Other cases relied on by plaintiff and holding private conduct to be state action for certain constitutional purposes do not concern ownership of property or territorial control. See, e.g., *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961) (refusal of private restaurant located in a publically owned and operated automobile parking facility to serve a person solely because of his color violated the Equal Protection Clause of the Fourteenth Amendment); *Terry* v. *Adams,* 345 U. S. 461 (1953) (refusal of private political association to permit otherwise qualified Negroes to participate in private elections deprived petitioners effective participation in public election contrary to Fifteenth Amendment); *Marjorie Webster Junior College, Inc.* v. *Middle States Association of Colleges and Secondary School, Inc.,* ..... F. Supp. ..... (D. D. C. July 23, 1969) (refusal of regional educational association to consider plaintiff for accreditation and membership solely because it

was not a non-profit organization violated the Fourteenth Amendment).

Of course, none of these cases, on their face, factually resembles the instant action. Plainly, not one case concerns privately owned newspapers. Only two of the cases, *Marsh* and *Logan Valley*, directly involves the First Amendment freedoms at issue here.

Moreover, the differences between the defendants in this case and those in the cases cited by plaintiff go far beyond the obvious fact that defendants here are newspapers while the defendants in the other cases were different kinds of private concerns. First and foremost, the press is treated with special Constitutional regard. No other private industry or organization has been afforded any protection similar to that granted to the press under the First Amendment. The only other industry that was ever treated specially in the Constitution was the liquor industry, but the Eighteenth Amendment was short lived, being repealed within fourteen years by the Twenty-First Amendment. Consequently, any attempted regulation of the press' freedom stands in a different Constitutional light and must be viewed differently than regulations of other forms of private commerce and association.

Second, the relation of the press to the government is functionally distinguishable from that relationship which exists between other private entities and the state. For instance, the restaurant in the *Burton* case was the lessee of an agency created pursuant to Delaware law. While it was considered an " 'impossible task' " "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause," state participation was apparent in the management of the property. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961). Moreover, Delaware, through its agency, had

"elected to place its power, property and prestige behind the admitted discrimination," and thereby became recognizable as a "joint participant in the challenged activity." *Id.* at 725. In *Terry,* the Jaybird Democratic Association or Jaybird Party was the dominant political group in a Texas county for over sixty years. Winning candidates in the Jaybird primary invariably won in subsequent Democratic primaries and in the general election. *Terry* v. *Adams,* 345 U. S. 461, 463 (1953). Essentially, the Court found that as the Jaybird election was a critical part of the general elective process, state involvement in permitting an abuse of its electoral processes was obvious. *Id.* at 469. The District Court, in *Marjorie Webster,* held that the educational association's performance of its accreditation function was action in a quasi-governmental capacity. The opinion noted that selection of educational institutions for federal funds "is frequently dependent upon the accredited status of the applicant," and found that the association's quasi-governmental capacity resulted "by virtue of its role in the distribution of Federal funds under the 'aid to education statutes.'" *Marjorie Webster Junior College, Inc.* v. *Middle States Association of Colleges and Secondary Schools, Inc.,* ..... F. Supp. ..... (D. D. C., Memorandum Opinion, p. 23, 1969). Essentially, the court agreed that the accreditating function practiced by defendant was inherently governmental, and that the association was exercising delegated powers of a governmental nature. Finally, the *Marsh* and *Logan Valley* decisions rested on the finding that the privately owned territory was indistinguishable, in terms of public access and use, from non-privately owned towns, business districts, and shopping centers. *Food Employees* v. *Logan Plaza,* 391 U. S. 308, 316-19 (1969).

A similar interdependence of the government and the defendant newspapers is lacking. Quite simply, the business of newspapers is not inherently governmental. Even

if we eliminated from our consideration the non-political and non-news aspects of today's major metropolitan papers, the reporting of the days events and related commentary is not a governmental function. Indeed, the opposite is true. While the government and its officials make news, they do not publish it. Significantly, while a company town may be likened to a municipal corporation and a private shopping center to a public business district, there is no state press, no American equivalent to Izvestia or Pravda.

Surely officials and agencies supply the press with information, but the function of reporting this information rests with the members of the media who may report as they wish or not at all. Then, too, public buildings often have special facilities for members of the press and statutes require publication of various items in the newspapers, *e.g.*, Ill. Rev. Stat. Ch. 24, § 1-2-4 (1967). However, none of these facts compels a conclusion that the press and the government are significantly intertwined or that the role of the press is an inherently governmental one.

Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. "The right of free public discussion of the stewardship of public officials was . . . , in Madison's view, a fundamental principle of the American form of government." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 275 (1964). So it is that the national policy favoring full and frank exercise of the press' freedom "may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. See Chafee, Free Speech in the United States, 19, 21-22, 29 (1954).

In sum, the function of the press from the days the Constitution was written to the present time has never been

conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of dissassociation.

Not surprisingly, then, plaintiff's position that newspapers are quasi-public bodies has clearly been rejected by the judiciary.

> "In the absence of any statutory provisions to the contrary, the law seems to be uniformly settled by the great weight of authority throughout the United States that the newspaper publishing business is a private enterprise and is neither a public utility nor affected with the public interest. The decisions appear to hold that even though a particular newspaper may enjoy a virtual monopoly in the area of its publication, this fact is neither unusual nor of important significance. The courts have consistently held that in the absence of statutory regulation on the subject, a newspaper may publish or reject commercial advertising tendered to it as its judgment best dictates without incurring liability for advertisements rejected by it." *Approved Personnel, Inc.* v. *Tribune Co.*, 177 So. 2d 704, 706 (Fla. App. 1965).

Accord, *Bloss* v. *Federated Publications, Inc.*, 145 N. W. 2d 800, 804 (Mich. App. 1966), *aff'd* 157 N. W. 2d 241 (Mich. 1968); *J. J. Gordon, Inc.* v. *Worcester Telegram Publishing Co.*, 177 N. E. 2d 586, 587-88 (Mass. 1961); see generally Annot., Right of Publisher of Newspaper or Magazine in Absence of Contractual Obligation, to Refuse Publication of Advertisement, 18 A. L. R. 3d 1286 (1965).

Nor do *Red Lion Broadcasting Co.* v. *F. C. C.*, 395 U. S. 367 (1969), or *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), require a finding that a Constitutional right of access to the printed news media exists. *Red Lion* upheld the Federal Communications Commission's fairness doctrine imposed on radio and television broadcasters. The

Supreme Court's opinion specifically rejected the broadcaster's argument that all communications media be treated equally under the First Amendment. 395 U. S. at 386. Special restrictions on electronic broadcasters were justified on technological grounds which are obviously not applicable to newspapers. *Id.* at 375-77, 86-87. As then Judge Burger said:

> "A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot." *Office of Communication of United Church of Christ* v. *F. C. C.*, 359 F. 2d 994, 1003 (D. C. Cir. 1966).

If a right of access existed with regard to newspapers, compliance with the rule would be considerably simpler than it is for broadcasters for a newspaper is a relatively flexible and expandable commodity. The defect in plaintiff's action is that no such rule exists.

In *New York Times*, the Supreme Court held that a state court cannot award damages to a public official for defamatory falsehood relating to his official conduct unless plaintiff proves actual malice. In the course of its opinion, the Court recognized the importance of editorial or political as opposed to commercial advertisements. 376 U. S. at 265-66. It found, as we could find in the instant case, that "as an expression of grievance and protest on one of the major issues of our time (the advertisement) would seem to qualify for the constitutional protection." *Id.* at 271. That protection does not mean that a newspaper can be forced to publish the ad. See *Mid-West Electric Cooperative, Inc.* v. *West Texas Chamber of Commerce*, 369 S. W. 2d 842 (Tex. & Civ. App. 1963). It means, rather, that an

expression may not be afforded different treatment by the state merely because it appears in the form of an advertisement and not, for instance, orally or on a picket sign or a handbill. *Id.* at 266. Consequently, political advertisements are constitutionally protected to no greater and no lesser extent than other forms of speech, and interference by state action with such expression is prohibited. The *New York Times* case decidedly does not stand for the proposition that those who can pay for political advertisements are constitutionally entitled to have them published by private businesses.

We are not insensitive to the problems that have developed or may arise because of a lack of access to the market place of ideas. One of the tragedies of our age is that the failure to communicate effectively through conventional means has led some to attempt to persuade unconventionally and often violently. To the extent that the market mechanism is impaired, to the extent that discussion is not effectively full as well as legally free, we think that the public is done a disservice. Yet, if, in many respects, private censorship is no better than public censorship, the fact remains that the right to free speech was never intended to include the right to use the other fellow's presses, that the Constitution relates only to governmental and not private action.

Even those who chide the press' aversion to "novel" and "heretical" ideas, recognize that "the daily press cannot be placed at the mercy of the collective vanity of the public." Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1629, 1646, 1677 (1967). In attempting to resolve this dilemna, access would be restricted to "representative groups" or at least not denied unless on "rational grounds." *Id.* at 1666, 1670, but see 1677. Under a doctrine of open access, the problems inherent in such line-drawing are obvious. Why limit space

to representative groups? Do not non-representative groups or individuals need greater assistance? Are there two sides to every issue or three or an indefinite number? Why limit access to the issue-oriented and not to the amateur sports writer or cartoonist? Most important, why limit access to those who can pay, for surely the poor are just as entitled to comment? The mere raising of these questions indicates why such extensive freedom is given to the press. There is scant, if any, middle ground between minor meddling and full abridgment. "(L)iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Chaffe, Government and Mass Communications, 633 (1947) (See generally at 624-650). Thus even though some abuse was considered inevitable, the alternative cure was thought by Madison to be worse than the disease, *Near* v. *Minnesota,* 283 U. S. 691, 716 (1931), and newspapers were and are left free to be impartial or biased, foolish or wise.

If, in fact, concentrations of private media power are stultifying, the appropriate approach to secure a right of access would be by "experimental, innovative legislation" or Constitutional amendments. Barron, *supra,* at 1670, 1676. However, this court does not sit as a creative legislative body, nor do we accept the admittedly "rather rabid conception of 'state action,' " *Id.* at 1669, that would compel private newspapers to print political advertisements.

With respect to Count I, the absence of state action relieves the court of civil rights jurisdiction and no other claim is stated upon which relief might be granted. Defendants' motions for summary judgment are granted. Plaintiff's motion for injunctive relief is denied. The cause is dismissed.

ENTER: /s/ ABRAHAM L. MAROVITZ,
Abraham L. Marovitz.

Date: December 19, 1969.

UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

Name of Presiding Judge, Honorable A. L. Marovitz.

Cause No. 69 C 1898 Date Dec. 19, 1969

Title of Cause

Chicago Joint Board, etc. vs. Chicago Tribune Co., et al.

Brief Statement of Motion

Disp. of defts mos for s. j.
Mo for preliminary contd to this date

Pursuant to the Court's memorandum opinion It Is Ordered that defendants' motions for summary judgment are granted, Plaintiff's motion for injunctive relief is denied and the Cause be and the same is hereby dismissed.

Marovitz, *J.*

UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

Name of Presiding Judge, Honorable Abraham Marovitz.

Cause No. 69 C 1898 Date Jan. 3, 1970

Title of Cause

Chicago Joint Board v. Chicago Tribune.

Brief Statement of Motion.

Mo. Pltff for leave to file Amend. to Complt.

Leave is granted Plaintiff to file Amendment to Complaint instanter. The pleadings heretofore filed by the defendants to the Complaint shall stand as defendants' pleadings to the amendment to complaint. Defendants move orally for summary judgment and said motion is granted and the complaint as amended be and the same is hereby dismissed.

Marovitz, *J.*

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1970—September Session, 1970

No. 18300

CHICAGO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,
Plaintiff-Appellant,

v.

CHICAGO TRIBUNE COMPANY, CHICAGO AMERICAN PUBLISHING COMPANY and FIELD ENTERPRISES, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 17, 1970

Before CASTLE, *Senior Circuit Judge,* and KILEY and CUMMINGS, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.* Plaintiff-appellant, Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, prosecutes this appeal from the order of the District Court granting summary judgment to the defendants-appellees, Chicago Tribune Company, Chicago American Publishing Company, and Field Enterprises, Inc., in the Union's action against said defendant newspaper publishers. The Union's complaint, as amended, seeks injunctive relief to compel the defendants to publish an editorial advertisement tendered by the Union; the

recovery of compensatory and punitive damages for defendants' refusals to publish such advertisement; the entry of a declaratory judgment declaring that defendants may not arbitrarily refuse to publish advertisements expressing ideas, opinions or facts on political or social issues and that defendants may not refuse to publish such advertisements if they are lawful and the party submitting the advertisement is willing to pay the usual rate and there is no technical or mechanical reason why the advertisement cannot be published; and that defendants be permanently enjoined from refusing to publish such lawful advertisements. Count I of the complaint, which seeks injunctive relief to compel publication of the specific advertisement tendered by the Union, and Count IV which seeks declaratory relief, assert a right in the Union[1] under the First and Fourteenth Amendments to compel the defendant newspaper publishers to accept its lawful editorial advertisements for publication at the usual rates for such advertisements. Counts II and III assert, respectively, alleged breach of contract and the Union's justifiable reliance upon the defendants' representations.

The District Court in granting defendants' motions for summary judgment found no genuine material issue of fact presented by the pleadings, affidavits, depositions and other materials before the court for consideration in connection with the motions, and concluded that absence of state action deprived the court of jurisdiction and no other claim is stated upon which relief might be granted. The appeal herein is grounded on the assertion that the court erred in its conclusion that defendants' refusals to publish the advertisement did not involve state action.

The Union is a Chicago labor union which represents clothing and garment workers. It has conducted a cam-

1. And in all others similarly situated on whose behalf it also sues under Count IV.

paign to limit the importation of foreign-made clothing into the United States on the grounds that the importation and sale of such clothing reduces the number of jobs available to its members. The campaign included picketing directed against Marshall Field & Co., the operator of a large Chicago department store which retails imported clothing and utilizes the advertising columns of the defendants' newspapers to advertise such merchandise.

The defendants Chicago Tribune Company and Chicago American Publishing Company each publish a Chicago newspaper: The Chicago Tribune and Chicago Today, respectively. The defendant Field Enterprises, Inc. is the publisher of The Chicago Sun-Times and The Chicago Daily News. There are no newspapers with general circulation throughout the Chicago metropolitan area other than the four newspapers owned and published by the defendants.

The Union, in an attempt to communicate its position to the general public in the Chicago metropolitan area and to the same readers who are exposed to Marshall Field & Co.'s advertisements, submitted to each of the defendants' four newspapers a full page advertisement which depicted a picket line beneath a representation of the Marshall Field's clock (an identifying feature of the Chicago department store), explained why the Union was picketing the Marshall Field & Co. store, and set forth the Union's basis for its opposition to the sale of imported foreign-made clothing. Each of the newspapers refused to publish the advertisement. Each reserves the right to reject any advertisement.[2]

2. The Field Enterprises, Inc. newspapers gave as a reason for its refusal a policy not to print advertisements naming others unless they consent to being named. The Chicago Tribune and Chicago Today stated its refusal was based on its conclusion the tendered advertisement failed to meet standards prescribed in the newspapers' Advertising Acceptability Guide which provide for the

The Union recognizes that with respect to the claims it asserts in Counts II and III of its complaint it must rely wholly on the doctrine of pendent jurisdiction, that these counts afford no independent basis for federal jurisdiction, and their justiciability in a federal court action depends upon whether Counts I and IV state a federal claim.

The Union contends that Counts I and IV of its complaint allege facts which establish a violation of rights guaranteed it by the First and Fourteenth Amendments, and therefore state a federal claim cognizable by the District Court in the exercise of that court's jurisdiction conferred by 28 U.S.C.A. §§ 1331 and 1343(3), because the factual allegations require a conclusion that the defendants' rejections of its editorial advertisement involved state action. In this connection the Union points to what it characterizes as a special relationship between the defendants' newspapers and the State arising from Illinois statutory provisions exempting newspaper employees from jury service;[3] requiring newspaper publication of certain legal notices,[4] notices of election[5] and municipal ordinances;[6] and excluding the purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news from the incidence of retailers' occupation, use and service use

rejection of an advertisement which in the newspapers' judgment "reflects unfavorably on competitive organizations, institutions or merchandise" or is "misleading", but further "reserves the right to reject any advertising which in its opinion, is unacceptable". The policy and the standards alluded to apparently provide norms for the rejection of specific types of advertising but they in no manner negate the reservation made by each defendant to reject any advertisement.

3. Ill. Rev. Stat. 1969, ch. 78, § 4.

4. Ill. Rev. Stat. 1969, ch. 110, § 14.

5. Ill. Rev. Stat. 1969, ch. 105, § 2-12; ch. 7½, § 2 and others.

6. Ill. Rev. Stat. 1969, ch. 24, § 1-2-4.

taxes;[7] from the Chicago city ordinance restricting newsstands permitted on public streets to the sale of daily newspapers printed and published in the city;[8] and from the custom of providing a designated space in public buildings for the news-gathering use of representatives of the press and other news media. It is urged that because the defendants, taken together, comprise the entire newspaper publishing industry with newspapers of general circulation throughout the Chicago metropolitan area, and are the recipients of economic benefit and favored treatment flowing from public sources as the result of the statutes, ordinance and custom above mentioned, their relationship to the State is such that there is "state involvement" in the operation of defendants' newspapers under the rationale relied upon by the Supreme Court of the United States to make conduct of a private business or enterprise subject to Fourteenth Amendment or other constitutional restrictions directed to state action. Cases cited as expressing that rationale include *Marsh* v. *Alabama,* 326 U. S. 501; *Terry* v. *Adams,* 345 U. S. 461; *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 and *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308. And, *Marjorie Webster Junior College, Inc.* v. *Middle States Association of Colleges and Secondary Schools, Inc.* (D. C. D. C. 1969) 302 F. Supp. 459 is pointed to as a recent application of such rationale.

But analysis of the foregoing argument on the basis of the controlling facts here involved reveals that the premises upon which it is constructed are unsound; that the conclusion drawn that there is "state involvement" in the operation of defendants' newspapers, or in the formulation or application of defendants' policies with respect to the acceptance or rejection of editorial advertising, is wholly

7. Ill. Rev. Stat. 1969, ch. 120, § 440, § 439.2 and § 439.32.

8. Municipal Code of the City of Chicago, § 34-12.

unwarranted; and that the decisions cited in support thereof are inapposite.

And, this appears to be especially so when the relevance of the argument advanced is viewed and measured against the background of the traditional concept of the role of the press in our society. In this latter connection the District Court in the memorandum opinion it filed aptly observed:

> "Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. 'The right of free public discussion of the stewardship of public officials was . . . , in Madison's view, a fundamental principle of the American form of government.' *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 275 (1964). So it is that the national policy favoring full and frank exercise of the press' freedom 'may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.' *Id.* at 270. See Chafee, Free Speech in the United States 19, 21-22, 29 (1954).
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> In sum, the function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation."

With this in mind, we turn to consideration of the decisions which are cited to us as enunciating the standards which are to be applied for the purpose of determining whether there is such state involvement in a private business or enterprise that the latter's action becomes state action within the purview of the restrictions imposed by the First and Fourteenth Amendments.

In *Marsh* v. *Alabama*, 326 U. S. 501, it was held that a "company town" which had assumed a role virtually indis-

tinguishable from any other publicly-incorporated municipality of the state also acquired the state's obligation to allow reasonable access to its streets for the free expression of thought. The Court reasoned (326 U. S. at 506-507):

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.
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> Whether a corporation or a municipality owns or possesses the town the public has an identical interest in the functioning of the community in such manner that the channels of communication remain free."

and held that the company's refusal to permit the use of its streets for the distribution of religious literature violated the Fourteenth Amendment.

More recently, in *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308, the rationale of *Marsh* was extended to a privately-owned shopping plaza which had assumed the status ordinarily associated with a city's central business district. The shopping plaza was held subject to the requirement that its sidewalks and parking area roadways, to which the general public had unrestricted access, be made available to pickets as in the case of other essentially public sidewalks and roadways.

The sidewalks and streets of a company town or a shopping center bear little analogy to the printing press, its product, and the distribution system of a newspaper publisher. Unlike the company town or the shopping center, none of the defendants has consented to unrestricted access by the general public to its advertising columns or pages. Such access is a matter of private contract. Nor in the publication of its newspapers has any of the defendants assumed the performance of a public function which carries

with it a concomitant obligation to each member of the general public.

Terry v. *Adams*, 345 U. S. 461, involved the refusal of a private political association to permit otherwise qualified Negroes to participate in private elections which action, for all practical purposes, deprived them of effective participation in a public election. The candidate who won in the privately conducted primary filed as a candidate in the subsequent primary of the dominant political party and invariably won there and in the general election. The Court in holding the action of the private political association, the Jaybird Party, violated the Fifteenth Amendment, pointed out (345 U. S. at 469, 476 and 477):

> "The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.
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> The exclusion of Negroes from meaningful participation in the only primary scheme set up by the State was not an accidental, unsought consequence of the exercise of civic rights by voters to make their common viewpoint count. It was the design, the very purpose of this arrangement that the Jaybird primary in May exclude Negro participation in July. That it was the action in part of the election officials charged by Texas law with the fair administration of the primaries, brings it within the reach of the law. The officials made themselves party to means whereby the machinery with which they are entrusted does not discharge the functions for which it was designed.
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> The evil here is that the State, through the action and abdication of those whom it has clothed with authority, has permitted white voters to go through a procedure which predetermines the legally designed primary."

We perceive no relevance of *Terry* to the facts here involved. There is no claim or indication that there is present any intermeshing of action or non-action by public officials with the action of the defendants in rejecting the tendered advertisement pursuant to a design or purpose to frustrate any First or Fourteenth Amendment right of the Union.

In *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, a municipal parking authority created as an agency of the State of Delaware leased a portion of its parking facility building to a restaurant concessionaire. The restaurant refused to serve Negroes. In holding that such discrimination violated the Fourteenth Amendment, the Court took occasion to observe (365 U. S. at 722):

> ". . . [T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' *Kotch* v. *Pilot Comm'rs,* 330 U. S. 552, 556. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

But the Court then pointed to numerous direct ties and relationships between the state agency and its concessionnaire-lessee. The Court noted that the land and building were publicly owned and under the enactment providing for the creation of the Authority the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions"; that the commercially leased areas constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate the project as a self-sustaining unit; that upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds; and that guests of the restaurant

are afforded a convenient place to park their automobiles, and, similarly, patrons of the parking facility are provided with a convenient place to dine. The Court concluded (365 U. S. at 724-725) that:

> "Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.
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> The State has so far insinuated itself into a position of interdependence with Eagle [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."

It is obvious from the facts involved in the instant case that there is no direct tie between any of the defendants and the State or any of its agencies either in the operation of the defendants' newspapers or in the refusals of the newspapers to publish the advertisement the Union proffered. And there is no relationship between the defendant newspaper publishers and the State comparable with that which was found in *Burton* to be a joint participation in the challenged activity and state involvement to a degree which amounted to state action.

In *Marjorie Webster Junior College, Inc.* v. *Middle States Association of Colleges and Secondary Schools, Inc.*, D. C. Cir., ... F. 2d ..... the District Court had held that a regional educational association responsible for the accreditation of colleges and secondary schools, which the court found to be acting "in a quasi-governmental capacity by virtue of its role in the distribution of Federal funds

under the 'aid to education statutes' " was subject to constitutional restraints in the performance of its accreditation function and was precluded from denying accreditation to a proprietary school solely because the school was not a non-profit institution (302 F. Supp. 459, 469-471). The Court of Appeals in reversing the District Court on the ground that, *inter alia,* the conduct of the association satisfied constitutional requirements, stated (..... F. 2d ....., ...):

> "We may assume, without deciding, that either the nature of appellant's activities or the federal recognition which they are awarded renders them state action subject to the limitations of the Fifth Amendment."

But the defendant newspaper publishers clearly are not engaged in the exercise of any governmental function, nor do they possess or exercise any delegated power of a governmental nature.

The Union, however, points to language used by the District Court in *Marjorie Webster* which the Union takes as characterizing the association there involved as one which "enjoys monopoly power in an area of vital public concern" (302 F. Supp. 459, 469)[9] and contends that this expression recognizes the existence of an additional standard which is to be equated with state action as a basis for subjecting private conduct to restraints imposed by the First and Fourteenth Amendments. But the context from which the Union borrows the expression indicates that it was used with reference to common-law justification for judicial intervention in the internal affairs of a private voluntary association, rather than as a recognition of an

9. Admittedly, the context from which the Union borrows the expression concerned an "area of vital public concern", the accreditation of educational institutions, and the association was the sole accrediting agency for the colleges and secondary schools of the region.

independent basis for subjecting private conduct to federal constitutional limitations. Apart from the question of the appropriateness of the use of such a standard for the latter purpose if the monopoly is not one conferred by the State or does not involve the exercise of a quasi-governmental function, a question we need not here decide, it has no application in the instant case. Neither Field Enterprises, Inc. nor the Chicago Tribune Company[10] enjoys a monopoly in the relevant market area, *i.e.*, the Chicago metropolitan area. The circulation figures for each of the four newspapers published by the defendants (each publishes two newspapers) are set forth in the Union's complaint. The figures clearly establish that neither of these defendant publishers approaches a monopoly position. The figures reflect a relatively high degree of competition between the defendants rather than monopoly control by one of them. And there is no allegation, nor is there any indication in the record, that there was any concert of action between these competitors in the refusal of each of them to accept the Union's advertisement for publication. There was no individual "monopoly power", and there was no exercise of monopoly power by means of combination.

The cases relied upon by the Union have no meaningful application to the facts and circumstances here involved. And they reflect no rationale which would afford a basis for concluding that the jury service exemption; the receipt of revenue from publishing legal notices, election notices, and ordinances; the use tax exemption on purchases of newsprint and ink; the ordinance restricting sidewalk newsstand vendors to the sale of local newspapers; and the

10. It appears that American Publishing Company, the additional defendant and publisher of Chicago Today, is a wholly owned subsidiary of the Chicago Tribune Company. For the purpose of this part of our opinion we treat these two companies as one publisher.

presence of press facilities in public buildings, either singly or collectively represent that state participation or state involvement which serves to color private conduct with the hue of state action.

The use tax exemption, which newspapers share in common with magazines and periodicals (*Time, Inc.* v. *Hulman,* 31 Ill. 2d 344, 201 N. E. 2d 374), does represent a "state involvement" in the limited sense that any tax exemption does, but not to a degree which constitutes state participation in the conduct or action of the enterprise granted the exemption. Cf. *Walz* v. *Tax Commission,* 397 U. S. 664.

None of the other factors mentioned in any manner approaches either state involvement or state participation. The jury service exemption runs to the individual newspaper employee.[11] If he chooses to assert the exemption there may be some indirect incidental benefit to his employer, the publisher, in that any operating inconvenience the employee's absence might occasion is avoided. But its impact ends there. It imparts no gloss of state involvement in the publisher's business or participation in the publisher's conduct. Likewise, revenue derived from publication of notices and ordinances, even if substantial, evidences no such effect. The State has no stake in the publisher's profit or lack thereof. The regulatory ordinance confining sidewalk newsstand vendors to the sale of local newspapers has no direct application to the defendants. It regulates the use of streets and sidewalks by vendors for the convenience of the public. It accommodates a primary interest of the public by providing convenient and ready access to a service—the supplying of local newspapers—without burdening the streets and sidewalks with

11. Ill. Rev. Stat. 1969, ch. 78, § 4 exempts from jury service, among others, "persons actively employed upon the editorial or mechanical staffs and departments of any newspaper of general circulation printed and published in this state".

vending stands offering other newspapers and periodicals for which there is less demand. The ordinance is of direct benefit to the public. It balances control of the streets and sidewalks for their primary use with a limited other use thereof in serving a public interest. If the restrictions of the ordinance are of any real benefit to the defendants it is merely incidental and, in our opinion, beside the point. The custom of providing space in public buildings for the news-gathering media is, likewise, an accommodation made to serve public convenience—not the newspapers—so that the government's activities can be freely and quickly reported with a minimum of interference with or disruption of the public's business.

We conclude that the Union's contentions are without merit.

The additional arguments advanced by *amici curiae* are equally unconvincing. It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this to be the concept of freedom of the press recognized in the First Amendment. The First Amendment guarantees of free expression, oral or printed, exist for all—they need not be purchased at the price *amici* would exact. The Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent.

The other contention advanced by *amici* is that in the context of a labor dispute private business rights of a neutral third party may be affected with a public interest which requires that the business (here the newspapers' advertising pages) be opened up to the labor organization for First Amendment purposes. We glean nothing from

the constitutional guarantees, or from the decisions expository thereof, which suggests that the advertising pages of a privately published newspaper may so be pressed into service against the publisher's will either in the context of a labor dispute to which the publisher is not a party or otherwise.

The judgment order appealed from is affirmed.

AFFIRMED.